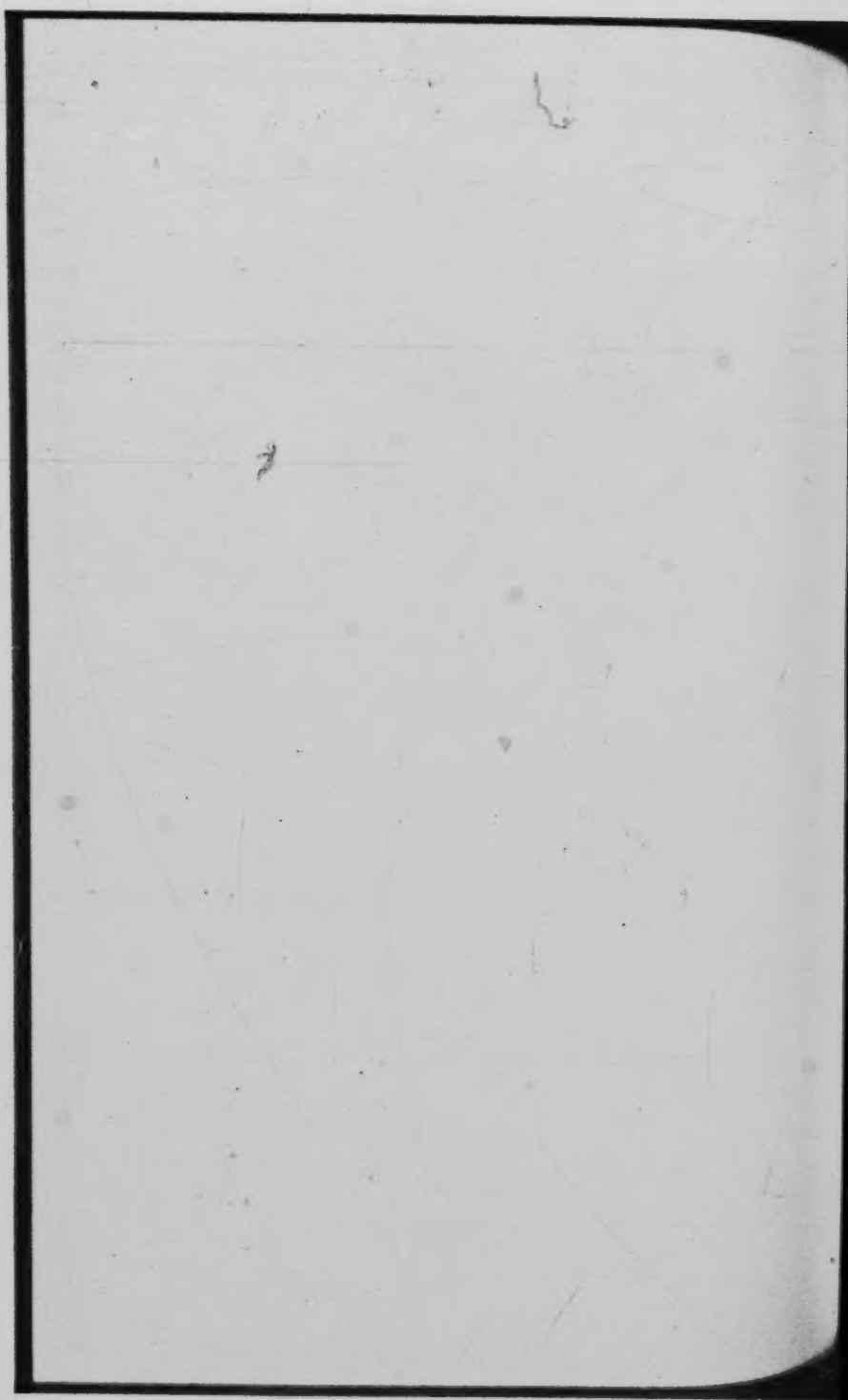

No. 73-804

In the
Supreme Court of the United States

October Term, 1973

GEORGE P. BAKER, RICHARD C. BOND, and JERVIS LANGDON, JR., TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, Debtor,

Petitioners,

vs.

GOLD SEAL LIQUORS, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Theodore J. Herst
17th Floor
125 South Clark Street
Chicago, Illinois 60603
Telephone: 312-346-7400
Attorney for Respondent

The Schaffer Press, Inc.—(312) 263-6650

INDEX

CASES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-804

GEORGE P. BAKER, RICHARD C. BOND, and JERVIS LANGDON, JR., TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, Debtor,

Petitioners,

vs.

GOLD SEAL LIQUORS, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The findings of fact and opinion of the District Court for the Northern District of Illinois, entered February 18, 1972, are unreported and appear as Appendix A to the Petition. The opinion of the Court of Appeals for the Seventh Circuit is reported at 484 F. 2d 950 (7th Cir. 1973).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Was the Court below correct in holding that the District Court below was not bound by Order No. 571, entered by the District Court for the Eastern District of Pennsylvania in the Penn-Central Reorganization proceedings?

STATEMENT OF THE CASE

Petitioners commenced a plenary action on December 22, 1970 in the United States District Court for the Northern District of Illinois, Eastern Division, to recover unpaid freight charges. Respondent counterclaimed for losses incurred from damage to shipments of merchandise bought by Respondent but delivered by Penn Central. Respondent's damages were almost three times the amount claimed by Petitioners.

The District Court, on the basis of stipulated facts, found Petitioners indebted to the Respondent for $18,016.77, the Respondent indebted to Petitioners for $6,999.76, and entered judgment in favor of Respondent for $11,017.01.

Petitioners appealed to the Court of Appeals for the Seventh Circuit which affirmed the District Court, holding that Order No. 571 of the Reorganization Court, reported in 339 Fed. Supp. 603 did not oblige the Illinois Court to withhold the full exercise of its jurisdiction in Petitioners' plenary suit in that forum.

ARGUMENT

There is no conflict between the Circuits.

The opinion of the District Court of the Eastern District of Michigan, in *George P. Baker, et al. Trustees of the Property of Penn Central Transportation Company, a Pennsylvania Corporation, Debtor, Plaintiffs, v. Southeastern Michigan Shippers Co-Operative Association, a Michigan Corporation, Defendant*, printed as Appendix C to the Petition, is not an expression of the law of the highest court of the Circuit.

Southeastern Michigan Shippers was decided on cross-motions for summary judgment. The Court denied the defendant's motion for summary judgment on its counterclaim on evidentiary grounds. The counterclaim being contested, and no evidence being offered to enable the Court to decide issues of the motion, summary judgment on the counterclaim was properly denied.

It should be noted that the Michigan court recognized the distinction between judicial and non-judicial setoffs which was an important factor in distinguishing the various reorganization decisions cited by Petitioners here and below from the law applicable to this case.

The Michigan court observed that there was little case law on the subject. We suggest that until the Seventh Circuit spoke in the case now before this Court, there was almost none. Apparently, the Michigan court in *Southeastern Michigan Shippers* had not seen the decision of the Seventh Circuit, since it was not cited or noted, and in fact did not appear in the advance sheets of the Federal Reporter, Second Series until issue No. 3 of 484 F. 2d, dated November 19, 1973. Perhaps it might have

considered further the extent of its jurisdiction with a different result.

The reasoning of the panel of the Seventh Circuit, it is submitted, leads to a more and just result than that contended for by Petitioners.

In re New York, New Haven and Hartford Railroad Company, 457 F.2d 683 (2d Cir. 1972) dealt with the question of which reorganization court, the Connecticut court, administering the New Haven reorganization, or the Pennsylvania court administering the Penn Central reorganization, had jurisdiction over property of the Penn Central acquired from the New Haven. There was no question of counterclaim or setoff, between creditor, debtor and the railroad, as in the case here on Petition but rather a conflict between two federal district courts sitting as reorganization courts, each claiming subject-matter jurisdiction over the same property at the same time. The jurisdiction of the Pennsylvania court was upheld, and the Connecticut court was declared to be without subject-matter jurisdiction, 457 F.2d at P. 691. Such is not the situation in the instant case where the Illinois court had subject-matter jurisdiction of the plenary suit instituted by Petitioners.

Calloway v. *Benton,* 336 U.S. 132 (1949) affords Petitioners little help. There this Court affirmed a decision of the Court of Appeals which reversed the action of a reorganization court in enjoining state court proceedings involving matters of state law affecting a lessor of property leased by a railroad in reorganization.

Order No. 571, of the Reorganization Court, cited by Petitioners as the "Shipper Setoff Case," is not applicable here. The Court of Appeals noted in its review, at 477 F.2d 843:

"The basic issue presented on this appeal is whether *a reorganization court* in a §77 proceeding *has summary jurisdiction* to enjoin *a non-judicial set-off* of claims for goods, services, and shipping losses and damages against freight charges, where such set-offs were effected prior to the Debtor's filing for reorganization. (Emphasis added)

That is not the issue in this case. Here we are dealing with the jurisdiction of the Illinois court, entertaining a plenary suit of the Petitioners, where it has subject-matter and personal jurisdiction in an action which the Court of Appeals has observed was nothing more than ordinary lawsuit. 484 F.2d at p. 951.

Besides, the classification by the Reorganization Court of the various shippers before it, 339 F. Supp. pp. 606-607, indicate factual situations different from this case and properly disposable by the exercise of summary jurisdiction.

Thompson v. *Texas Mexican R. Co.*, 328 U.S. 134 (1946) holds merely that in reorganization matters creditors' claims are to be "reduced to judgment and may then be presented to the bankruptcy court for proof and allowance." 332 U.S. at p. 141. That was what was done in the instant case; the Illinois judgment recovered by Respondent standing as a claim in the reorganization proceeding of Penn-Central, subject to allowance on proof.

Order No. 571 of the Pennsylvania reorganization court was not binding or controlling on the Illinois court. It is submitted that there is no basis or reason to grant certiorari in the instant case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

THEODORE J. HERST
17th Floor
125 South Clark Street
Chicago, Illinois 60603
Attorney for Respondent.